Supreme Court, U.S.
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No. 93-1773

In The

Supreme Court of the United States

October Term, 1993

ELAINE DEATON, et al.,

Petitioners,

v.

CITY OF DAYTON, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the general personal injury statute of limitations in Ohio, R.C. § 2305.10, is the appropriate statute of limitations for § 1983 claims arising in Ohio as set forth by the Sixth Circuit Court of Appeals in *Browning v. Pendleton*, 869 F.2d 992 (6th Cir. 1989) (en banc).

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STATEMENT OF THE CASE

STATEMENT OF FACTS

On March 24, 1989, as a result of blocking the entrance to the Dayton Women's Health Center in Kettering, Ohio, plaintiffs were arrested and charged with criminal trespass in violation of a Montgomery County Common Pleas Court injunction. Initially, petitioners were detained at both the Kettering City Jail and Montgomery County Jail and then were later transferred to the Dayton Human Rehabilitation Center (DHRC).

Petitioners allege that while being processed into the DHRC, each of them was subjected to a strip search as part of the incarceration procedures. In addition, petitioners allege they were subjected to further strip searches while detained at the center.

Petitioners filed suit on March 22, 1991, approximately two days before the applicable statute of limitations expired. Petitioners originally filed suit against Montgomery County, Ohio and its employees, erroneously believing those entities were the proper parties. The defendants in that action moved for summary judgment on the grounds that petitioners had failed to name the proper parties as defendants as none of the defendants were in any way connected to the DHRC. The court granted defendants' motion for summary judgment on February 27, 1992. Petitioners in that case took no action during the pendency of the initial suit to amend their pleadings to add any of the present respondents.

After losing on summary judgment grounds in the initial suit, petitioners later asserted suit against the City of Dayton, the superintendent of the DHRC, and several

unidentified city employees alleged to have conducted the strip searches. That suit was filled approximately three years after the alleged acts took place. Respondents filed and were granted summary judgment on the issue of the statute of limitations. That issue is now before the Court.

PROCEEDINGS

Respondent has no dispute as to the procedural history as narrated by petitioner in this action.

SUMMARY OF ARGUMENT

In 1989, pursuant to the mandate of the United States Supreme Court, the Sixth Circuit Court of Appeals selected the general personal injury statute of limitations in Ohio, R.C. § 2305.10 as applicable to § 1983 claims. That statute of limitations has been uniformly applied to § 1983 claims since that time. The four-year statute of limitations, R.C. § 2305.09(D), was appropriately rejected as being more in the nature of a catch-all statute. Catch-all statutes have been expressly rejected as inapplicable to § 1983 claims by the United States Supreme Court. The four-year statute of limitations was also properly rejected on the grounds that it has been construed to be applicable to intentional tort causes of actions. Section 1983 claims are not properly analogized to intentional tort causes of action.

Although R.C. § 2305.10 appears to be limited to claims for "bodily injury and property damage," courts have broadly construed it to include substantially all claims for personal injury. The majority of those courts in Ohio which have considered the issue have applied R.C. § 2305.10 to § 1983 claims. The two-year statue of limitation furthers the remedial purpose of § 1983 while at the same time providing a reasonable end to any stale claims.

ARGUMENT

I. THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY DETERMINED THAT R.C. § 2305.10 IS THE GENERAL PERSONAL INJURY STATUTE OF LIMITATIONS IN OHIO APPLICABLE TO § 1983 ACTIONS.

No federal statute of limitations period exists for § 1983 actions. As a result, courts were instructed to borrow the state statute of limitation which was most analogous to the particular § 1983 claim. However, since statutes of limitations varied widely from state to state, it was not possible to achieve uniformity among states regarding a § 1983 statute of limitations.

Originally, the United States Supreme Court addressed this issue in *Wilson v. Garcia,* 471 U.S. 261 (1985). In *Wilson,* the United States Supreme Court held that in each state, a single statute of limitations should be borrowed for § 1983 claims and that the period favored should be one governing "general personal injury actions, sounding in tort." *Wilson,* 471 U.S. at 279. In so

ruling, the court in *Wilson* expressly rejected catch-all periods of limitations. *Id.* at 278.

However, the decision in *Wilson* did not completely resolve the issue. Several states possessed various statutes of limitation for identifiable causes of action. Several federal circuits, including the Sixth Circuit Court of Appeals, concluded the state statute of limitations applicable to intentional torts was the appropriate statute of limitations for § 1983 claims. *See Mulligan v. Hazard*, 777 F.2d 340, 344 (6th Cir. 1985).

As a result of these holdings, the United States Supreme Court revisited this issue in *Owens v. Okure*, 488 U.S. 235 (1989). The Court in *Owens* found that § 1983 claims were *not* to be analogized to intentional torts and that:

> applying the statute of limitations for the limited category of intentional torts would be inconsistent with § 1983's broad scope. We accordingly hold that where state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the general or residual statute for personal injury actions.

Owens, 488 U.S. at 249-250. In *Owens*, the Court reasserted its rejection in *Wilson* of catch-all statutes of limitation. *Id.* at 250, n. 12.

With the aid of the decision in *Owens*, the Sixth Circuit Court of Appeals in *Browning v. Pendleton*, 869 F.2d 989 (6th Cir. 1989) (en banc), laid to rest the confusion and uncertainty as to which of Ohio's several statute

of limitations was applicable to § 1983 claims. In *Browning*, the Sixth Circuit, in an en banc decision, held that the general personal injury statute of limitation, Ohio Rev. Code § 2305.10, which provided a two-year statute of limitations, was the appropriate statute of limitations for § 1983 claims. The Sixth Circuit's holding in *Browning*, five years ago, provided a significant measure of uniformity and predictability with respect to § 1983 claims and the applicable statutes of limitations. As a result, Ohio Rev. Code § 2305.10, has been uniformly applied to § 1983 claims arising in the state of Ohio. *See Thomas v. Shipker*, 872 F.2d 772 (6th Cir. 1989); *Emmons v. McLaughlin*, 874 F.2d 351 (6th Cir. 1989); *Hull v. Cuyahoga Valley Joint Vocational School Dist. Board of Education*, 926 F.2d 505 (6th Cir. 1991); *Friedman v. Estate of Presser*, 929 F.2d 1151 (6th Cir. 1991); *Harris v. Board of Educ.*, 798 F. Supp. 1331 (S.D. Ohio 1992); *Francis v. Cleveland*, 78 Ohio App. 3d 593, 605 N.E.2d 966 (8th Dist. Ct. App. 1992).

Petitioner asserts that the decision in *Browning* is contrary to the Supreme Court's holding in *Owens* and that R.C. § 2305.09(D) is the appropriate statute of limitations for § 1983 claims in Ohio. Contrary to petitioner's assertions, the Sixth Circuit Court of Appeals has considered and rejected Rev. Code. § 2305.09(D) as applicable to § 1983 claims, finding that statute of limitations is more in the nature of a catch-all statute of limitations as compared to the general personal injury statute of limitations of R.C. § 2305.10. *Mulligan v. Hazard*, 777 F.2d 340, 343, n. 4 (6th Cir. 1985), *cert. denied*, 476 U.S. 1174 (1986). The Sixth Circuit reaffirmed its position in rejecting R.C. § 2305.09(D) in the unreported decision of *Paladin v. Doyle*, Case No. 90-3242 1990 U.S. App. LEXIS 17324 (6th

Cir. 1990) (Appendix A). In *Paladin*, the plaintiffs sought to have R.C. § 2305.09(D) applied to § 1983 claims. The court rejected the statute, stating: "in light of our recent decision in *Collard v. Kentucky Bd. of Nursing*, 896 F.2d 179, 181-82 (6th Cir. 1990), that contention is without merit." *Id.* In *Collard*, an essentially similar statue of limitations was rejected by the Sixth Circuit.[1] The Sixth Circuit examined that statute in light of the holding in *Owens v. Okure* 488 U.S. 235 (1989) and held the statute was not applicable to § 1983 claims. The court stated:

> It is clear that Kentucky intended to generally deal with personal injury actions in § 413.140 and that § 413.140(1)(A) is appropriately referenced as a general personal injury limitation statute.

Id. at 182. In its unreported decision in *Paladin v. Doyle*, the Sixth Circuit Court of Appeals adopted its reasoning in *Collard* and rejected R.C. § 2305.09(D) as applicable to § 1983 claims arising in Ohio. (*Appendix A*).

A. THE DETERMINATION OF THE APPROPRIATE STATUTE OF LIMITATIONS FOR § 1983 ACTIONS IS PECULIARLY A FUNCTION OF FEDERAL LAW.

Petitioner looks to Ohio case law to determine which of Ohio's statute of limitations is the general or personal

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[1] Kentucky law provided a five-year statute of limitations for "an action for an injury to the rights of the plaintiff not arising on contract and not otherwise enumerated." Ky. Rev. Stat. An. § 413.120(6) (Baldwin 1988). *Collard v. Kentucky Bd. of Nursing*, 896 F.2d 179, (6th Cir. 1990).

residual personal injury statute for § 1983 purposes. However, it is undisputed that the characterization of § 1983 claims for the purpose of determining the appropriate statute of limitations is the province of federal law. *Wilson v. Garcia*, 471 U.S. 261, 269 (1985). Thus, the determination of which state's statute of limitations is the general statute of limitations for § 1983 purposes is properly governed by appropriate federal precedent. The application of federal law to the issue of statute of limitations in § 1983 claims is consistent with the need to promote uniformity and also provides for the " 'predominance of the federal interest' in the borrowing process taken as a whole." *Id.* at 269 (quoting *Burnett v. Grattan*, 468 U.S. 42, 48 (1984)). Reference to federal law in this matter demonstrates the applicable statute of limitations for § 1983 claims arising in Ohio is Ohio Rev. Code § 2305.10. *Browning v. Pendleton*, 869 F.2d 989 (6th Cir. 1989).

B. REFERENCE TO LAW OF OHIO DEMONSTRATES THAT R.C. § 2305.10 IS BROADLY CONSTRUED AS THE GENERAL PERSONAL INJURY STATUTE OF LIMITATIONS.

Even if this Court should accept petitioner's claim that state law should govern the determination of which various statute of limitations is the applicable statute of limitations for § 1983 claims, it is clear R.C. § 2305.10 is the general personal injury statute for Ohio. Although R.C. § 2305.10, by its language, appears to apply solely to claims of bodily injury, i.e., physical injury, the scope of R.C. § 2305.10 has been broadened by judicial construction to include substantially all claims for personal injury.

> [W]hether a suit is brought in contract or tort, when the "essence" of an action is wrongful harm to person or personal property, the R.C. § 2305.10 statute of limitations is the one to apply.

Ressallat v. Burglar & Fire Alarms Inc., 79 Ohio App. 3d 43, 606 N.E.2d 1001 (1992) (citations omitted).

Of significance is petitioner's citation of *Lawyers Cooperative Pub. Co. v. Muething*, 65 Ohio St. 3d 273, 603 N.E.2d 969 (1992). An examination of that holding demonstrates that Ohio Rev. Code § 2305.10 is considered to be the general personal injury statute for personal injury claims for Ohio. In Ohio, the controlling rule of law of an Ohio Supreme Court opinion is found in the court's syllabus. Ohio Supreme Court Rule for the Reporting of Opinions, Rule 1. The syllabus in *Muething* states:

> A negligence claim asserting *emotional distress, pain and suffering, humiliation, and loss of reputation is a claim for personal injuries* and is governed by the statute of limitations set forth in R.C. § 2305.10.

Muething, 65 Ohio St. 3d at 273, syllabus 2, 603 N.E.2d at 969, syllabus 2 (emphasis added). Based on the decision from *Muething*, it is clear the Ohio Supreme Court regards all personal injury claims, including emotional distress, humiliation, and loss of reputation as governed by the general statute of limitations in R.C. § 2305.10.

In support of their position, petitioners rely upon cases which applied R.C. § 2305.09(D) to claims of intentional infliction of emotional distress and abuse of process. Both causes of action have as part of their basic elements intentional conduct. *See Lawyers Cooperative Pub.*

Co. v. Muething, 65 Ohio St. 3d 273, 603 N.E.2d 969 (1992); *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.*, 68 Ohio St. 3d 294, 626 N.E.2d 115 (1994) (Abuse of process requires evidence that a proceeding has been perverted to attempt to accomplish an ulterior purpose). However, the United States Supreme Court has expressly held that § 1983 claims should *not* be analogized to intentional torts. *Owens*, 488 U.S. at 249-250. The Sixth Circuit Court of Appeals cited this fact as an additional basis in rejecting § 2305.09(D). *Hull v. Cuyahoga Valley Joint Vocational School Dist. Board of Education*, 926 F.2d 505, 510 (6th Cir. 1991).

The fact that the state of Ohio may apply § 2305.09(D) to three identifiable causes of action does not mandate that it is the statute applicable to claims arising under § 1983. As provided by the United States Supreme Court in *Wilson* and *Owens*, resort to the residual or catch-all statute is only necessary where state law does not provide a general personal injury statute. *Wilson* 471 U.S. at 278. *Owens*, 488 U.S. 250, n. 12. Here, Ohio clearly provides a general personal injury statute in R.C. § 2305.10.

C. A MAJORITY OF COURTS IN OHIO WHICH HAVE CONSIDERED THE ISSUE HAVE ADOPTED R.C. § 2305.10 AS THE APPLICABLE STATUTE OF LIMITATION FOR § 1983 CLAIMS.

Petitioner asserts the decision in *Bojac Corp. v. Kutevac*, 64 Ohio App. 3d 368, 581 N.E.2d 625 (Trumble Cty. 1990) is the controlling decision from Ohio on this issue. However, it is apparent that the decision in *Bojac* is in the minority of Ohio courts which has considered the

issue. The majority of decisions in Ohio, post *Owens*, have determined that R.C. § 2305.10 is the limitations period which is applicable to § 1983 claims. *See e.g., Francis v. Cleveland*, 78 Ohio App. 3d 593, 605 N.E.2d 966 (1992). *Dennis v. Toledo Police Dept.*, Case No. L-90-157 1991 Ohio App. LEXIS 1583 (Lucas Cty. 1991) (Appendix B); *Twine v. Probate Court*, Case No. 89AP-1170, 1990 Ohio App. LEXIS 2665 (Franklin Cty.), *mot. overruled*, 55 Ohio St. 3d 706, 563 N.E.2d 301 (1990) (Appendix C); *Freshour v. Carroll*, Case No. 88CA 34, 1989 Ohio App. LEXIS 3273 (Pickaway Cty. 1989), *mot. overruled*, 48 Ohio St. 3d 706, 549 N.E.2d 1193 (1990) (Appendix D).

The Ohio Supreme Court has never spoken on the issue of the applicable statute of limitations for § 1983 claims. If this court should adopt petitioners' argument that the determination of the appropriate statute of limitations for § 1983 claims is a function of state law, the applicable majority rule in the state of Ohio mandates the adoption of R.C. § 2305.10 as the appropriate statute of limitations for § 1983 claims. The fact that these various courts agree with and have adopted the Sixth Circuit's selection of the general statute of limitations of § 2305.10 does not detract from the precedential value of these decisions.

D. APPLICATION OF R.C. § 2305.10 PROMOTES THE REMEDIAL PURPOSE OF § 1983 WHILE AT THE SAME TIME FURTHERING THE GOAL OF A STATUTE OF LIMITATION.

The en banc decision rendered in *Browning v. Pendleton*, five years ago resolved the dispute as to the

appropriate statute of limitations for § 1983 claims in Ohio. The decision in *Browning*, based on this Court's guidance in *Owens* and *Wilson*, provided a measure of uniformity and predictability for § 1983 claimants in determining that the appropriate statute of limitations in Ohio, for § 1983 claims, is two years. The adoption of a two-year statute of limitations for § 1983 claimants promotes the remedial purposes of § 1983 by providing a significant period of time in which to obtain relief for the violation of an individual's civil rights while at the same time promoting justice by preventing surprise from the reemergence of stale claims. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974).

In fact, the two-year period which has been applied to § 1983 claims in the last five years in the state of Ohio is uniform with that of several other states. *See e.g., Perez v. Seevers*, 869 F.2d 425, 426 (9th Cir.), *cert. denied* 493 U.S. 860 (1989) (two-year statute of limitations Nev. Rev. Stat. § 11.190(4)(E)(1993)); *Kalimara v. Illinois Dept. of Corrections*, 879 F.2d 876 (7th Cir. 1989) (two-year statute of limitations in Illinois, Ill. Rev. Stat. Ch. 110, para. 13-202) (currently 735 ILCS 5/13-202 (1994)); *Burrell v. Newesome*, 883 F.2d 416 (5th Cir. 1989) (two-year statute of limitations in Texas, Texas Civ. Prac. & Rem. Code § 16.003(A) (1994); *Coopwood v. Lake County Comm. Dev. Dept.*, 932 F.2d 677, 678 (7th Cir. 1991) (two-year statute, Ind. Code § 34-1-2-2 (Burns 1993); *Cito v. Bridgewater Township Police Dept.*, 892 F.2d 23 (3d Cir. 1989) (two-year New Jersey statute, N.J. Stat. 2A: 14-2 (1993)).

As indicated, the goal of the decision in *Wilson* and *Owens* was to provide uniformity and predictability with

respect to § 1983 claims. Application of the general personal injury statute in Ohio, § 2305.10 clearly promotes the desired uniformity with respect to claims arising under § 1983.

CONCLUSION

Based on the uniformity and predictability provided by the en banc decision of *Browning v. Pendleton*, 869 F.2d 989 (6th Cir. 1989) (en banc) and the consistency of that decision with United States Supreme Court precedent as well as Ohio precedent, respondent submits petitioner's Petition for Certiorari should be rejected. It is respectfully submitted that the Petition for a Writ of Certiorari should be denied and petitioners request for summary reversal be rejected.

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APPENDIX

Appendix A *Paladin v. Doyle*, Case No. 90-3242, 1990 U.S. App. LEXIS 17324 (6th Cir. 1990).....1A

Appendix B *Dennis v. Toledo Police Dept.*, Case No. L-90-157, 1991 Ohio App. LEXIS 1583 (Lucas Cty. 1991) 4A

Appendix C *Twine v. Probate Court*, Case No. 89AP-1170, 1990 Ohio App. LEXIS 2665 (Franklin Cty.), *mot. overruled*, 55 Ohio St. 3d 706, 563 N.E.2d 301 (1990) 13A

Appendix D *Freshour v. Carroll*, Case No. 88CA 34, 1989 Ohio App. LEXIS 3273 (Pickaway Cty. 1989), *mot. overruled*, 48 Ohio St. 3d 706, 549 N.E.2d 1193 (1990).....20A

APPENDIX A

RICHARD A. PALADIN; SALLY J. PALADIN, Plaintiffs-Appellants, v. THOMAS C. DOYLE, Detective; ROBERT JAKSA, Detective; WILLIAM DEPLEDGE, Chief of Police; CITY OF EASTLAKE, Defendants-Appellees

PALADIN v. DOYLE

No. 90-3242

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

1990 U.S. App. LEXIS 17324

September 27, 1990, Filed

NOTICE:

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

SUBSEQUENT HISTORY: Reported as Table Case at 914 F.2d 1494, 1990 U.S. App. LEXIS 24345.

PRIOR HISTORY:

On Appeal from the United States District Court for the Northern District of Ohio; No. 89-01929; Krenzler, Judge.

JUDGES: Kennedy and Krupansky, Circuit Judges; and Engel, Senior Circuit Judge.

OPINION: ORDER

Plaintiffs, Richard A. and Sally J. Paladin, appeal an order of the district court which dismissed their civil rights action. They now move that the appeal be heard by the court sitting en banc. Upon review of the record and the briefs, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

On October 6, 1989, plaintiffs filed a complaint pursuant to 42 U.S.C. § 1983 in the United States District Court for the Northern District of Ohio. As the basis of their request for both punitive and compensatory damages, they alleged that on July 3, 1986, defendants, the city of Eastlake, Ohio and its law enforcement agents, subjected them to an illegal arrest and interrogation. Based upon the contention that the complaint had been filed outside the two year period provided by Ohio Rev. Code § 2305.10, the statute of limitations governing civil rights actions arising in that state, defendants sought the dismissal of the complaint for failure to state a claim upon which relief could be granted under Fed. R. Civ. P. 12(b) (6). After consideration of plaintiffs' response, the district court agreed and dismissed the complaint. Plaintiffs then filed this appeal.

After thorough consideration of the record and the arguments contained in plaintiffs' brief, this court has concluded that the district court did not err in dismissing the complaint. In Browning v. Pendleton, 869 F.2d 989,

992 (6th Cir. 1989) (en banc), this court held that pursuant to Ohio Rev. Code § 2305.10 civil rights actions arising in that state must be brought within two years of their accrual. Plaintiffs' cause of action, which was grounded upon allegations of false arrest and imprisonment, accrued on July 3, 1986. McCune v. City of Grand Rapids, 842 F.2d 903, 906 (6th Cir. 1988). As plaintiffs did not file their complaint until more than three years after that date, their cause of action is clearly barred by the statute of limitations. Furthermore, the court has considered plaintiffs' argument that the decision in Browning, 869 F.2d at 992, is in error and that the Ohio Rev. Code § 2305.09(D) should be adopted to provide a four year period for the commencement of such actions. In light of our recent decision in Collard v. Kentucky Bd. of Nursing, 896 F.2d 179, 181-82 (6th Cir. 1990), that contention is without merit.

Accordingly, the motion to hear the appeal en banc is denied and the district court's final order dismissing the complaint if [sic] hereby affirmed. Rule 9(b)(5), Rules of the Sixth Circuit.

APPENDIX B

Robert Dennis, Appellant v. Toledo Police Department, et al., Appellees

Dennis v. Toledo Police Dept.

No. L-90-157

Court of Appeals of Ohio, Sixth Appellate District, Lucas County

1991 Ohio App. LEXIS 1583

April 12, 1991, Decided

PRIOR HISTORY:

Appeal from Trial Court No. CV 88-3966.

COUNSEL: Vesper C. Williams, II, for appellant.

Samuel J. Nugent, for appellees Toledo Police Department and M. Babcock.

David J. Simko, for appellee Lucas County Sheriff's Department.

JUDGES: Charles D. Abood, Judge, Melvin L. Resnick, Judge, James R. Sherck, Judge, concur.

OPINION: DECISION AND JOURNAL ENTRY

This case comes on appeal from a judgment of the Lucas County Court of Common Pleas which granted

summary judgment in favor of defendants-appellees, the Toledo Police Department and the city of Toledo on April 17, 1990, and in favor of appellee, the Lucas County Sheriff's Department on September 19, 1989. Partial summary judgment was also granted to appellee, Officer Michael Babcock of the Toledo Police Department on April 17, 1990.

Appellant, Robert E. Dennis, appeals the trial court's judgment and asserts the following assignment of error:

"1. The trial court erred in ruling on motions for summary judgment that defendants the City of Toledo, the Toledo Police Department and the Lucas County Sheriff Department were entitled to judgment as a matter of law pursuant to R.C. 2744.02(B) when the facts plead [sic] in plaintiff's Complaint also constitute a violation of Section 1983, Title 42, U.S. Code, the Fourth and the Fourteenth Amendments of the U.S. Constitution which are exempted by R.C. 2744.09(E)."

On December 12, 1987, appellant was arrested for aggravated burglary, disorderly conduct and resisting arrest.

On December 12, 1988, appellant filed a civil complaint against the Police Department of the City of Toledo; M. [Michael] Babcock, a Toledo police officer, and an unknown Toledo police officer both acting in their official capacities; the Lucas County Sheriff's Department and a Michael Price. The basis of the complaint was alleged official misconduct at the time of appellant's arrest on December 12, 1987.

The complaint alleged that Officer Babcock and the unknown Toledo police officer had assaulted appellant during the course of his arrest thereby causing him physical injury and emotional distress. Appellant claimed that appellees, the Toledo Police Department, Officer Babcock and the unknown Toledo police officer were liable for the injuries resulting from the assault under the common law theories of intentional or negligent assault, intentional infliction of emotional distress and respondeat superior.

In his complaint, appellant further alleged that, while in the Lucas County Jail, he was assaulted by another inmate, Michael Price. Appellant claimed that Price was known by the Lucas County Sheriff's Department to be dangerous and capable of violence and that the sheriff's department breached its duty to protect him while he was in its custody. Appellant further alleged that the Lucas County Sheriff's Department was negligent in that he was denied adequate medical treatment for the injuries received through Price's wrongful conduct.

Appellant prayed for compensatory and punitive damages and costs in a total amount of $220,000 – $100,000 from the Toledo Police Department for the assault, $20,000 from the Toledo Police Department for the intentional infliction of emotional distress and $100,000 from the Lucas County Sheriff's Department and Price.

All defendants, excepting Michael Price and the unknown Toledo Police officer[1] filed answers to the complaint. On July 5, 1989, appellee, the sheriff's department, filed a motion for summary judgment. This appellee asserted that the sovereign immunity statute, R.C. 2744.01, et seq. and, more specifically, R.C. 2744.02(B) and 2744.02(B)(4), precluded appellant's cause of action based on negligent conduct which allegedly occurred within a county jail and prevented the imposition of an award of civil damages upon a political subdivision of the state. Appellant never filed a memorandum in opposition to the motion for summary judgment.

On September 19, 1989, the trial court granted appellee's motion for summary judgment and found that the Lucas County Sheriff's Department was immune under R.C. 2744.02(B)(4).

On February 2, 1990, appellees, the city of Toledo, the Toledo Police Department, the unknown Toledo police officer and Officer Babcock filed a motion for summary judgment. The city of Toledo and the Toledo Police Department requested summary judgment on all of the allegations against them and based their motion on the sovereign immunity statute, specifically, on R.C. 2744.01(A)(1). The motion for summary judgment in favor of the unknown Toledo police officer was founded upon Civ. R. 3(A), failure to name and serve a party within one year of the commencement of a civil action. As

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[1] Michael Price and the unknown Toledo police officer were never served with process. Neither ever appeared, in any way, in this action.

to Officer Babcock, the motion requested summary judgment only as to any negligent acts which he allegedly committed in the course of his employment as a Toledo police officer. Appellees asserted that Officer Babcock was immune from liability for such acts under R.C. 2744.03(A)(6).

On February 27, 1990, appellant filed a memorandum in opposition to appellees' motion for summary judgment. In that motion, appellant claimed, among other things, that his complaint set forth a cause of action pursuant to 42 USC § 1983 ("Section 1983"). That is, appellant maintained that the complaint stated a civil action based upon alleged violations of the Constitution or statutes of the United States and therefore, under R.C. 2744.09(E), the sovereign immunity statute was inapplicable to his cause of action.

On April 17, 1990, the trial court granted summary judgment in favor of the city of Toledo and the Toledo Police Department finding that these appellees were immune from civil liability by operation of R.C. 2744.02(B). The court further found that appellant had failed to state a cognizable claim pursuant to Section 1983. The unknown Toledo police officer was granted summary judgment as a matter of law. Officer Babcock was granted summary judgment only as to any alleged negligent acts. The court in ruling on summary judgment denied the same as to the intentional infliction of emotional distress claim even though appellees' motion for summary judgment never addressed this issue. Therefore, the trial court's journal entry of April 17, 1990, is, in this regard only, a nullity. The trial court's judgment entry contained certification, as required by Civ. R. 54(B).

The sole question before this court is whether appellant's complaint states a claim against appellees under 42 USC § 1983 so as to prevent summary judgment based upon Ohio's sovereign immunity statute. In other words, did the trial court err in determining that no cognizable claim was stated in the complaint which would permit appellant's civil action to proceed under the auspices of R.C. 2744.09(E)?

Before a court may grant a motion for summary judgment, three criteria must be met. This tripartite test is set forth in Harless v. Willis Day Warehousing Co. (1978), 54 Ohio St. 2d 64, at 66, and requires that the movant demonstrate:

"(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor."

Civ. R. 8 provides the framework for notice pleading. Under Civ. R. 8(A) and (E), the pleader need only set forth sufficient operative facts to give the other party or parties fair notice of the nature of his action. Salamon v. Taft Broadcasting Co. (1984), 16 Ohio App. 3d 336, 338. However, the pleading must contain either direct allegations on every material point necessary to sustain recovery on any legal theory or contain allegations from which an inference may be drawn that evidence on the material points will be presented at trial. Francher v. Francher (1982), 8 Ohio App. 3d 79, 83, quoting 5 Wright & Miller,

Federal Practice and Procedure: Civil (1969), at 120-123, Section 1216.

In the instant case, appellant set forth four causes of action. Nowhere in his complaint did he expressly assert a claim pursuant to Section 1983. The case proceeded upon the common law theories of intentional or negligent assault, intentional infliction of emotional distress, breach of a duty to protect (negligence) and breach of a duty to provide adequate medical care (negligence). Because appellant raised civil rights violations as against the Lucas County Sheriff's Department for the first time on appeal, that governmental entity had no notice of or opportunity to defend against a Section 1983 claim. In fact, appellant's civil rights theory was asserted, for the first time, more than two years after his cause of action under Section 1983 had accrued. Essentially, in raising the issue in his memorandum in opposition to the motion of the city of Toledo, et al., for summary judgment, appellant sought to amend his pleadings without following the procedures required by Civ. R. 15 and, in the process, prevent his civil rights action as against the Lucas County Sheriff's Department from being time-barred by the statute of limitations. See Browning v. Pendleton (C.A.6, 1989), 869 F. 2d 989 (two year statute of limitations for Section 1983 actions based on personal injury). This was not the purpose for which the civil rules were promulgated.

Furthermore, appellant's complaint fails to state a claim under Section 1983 as against any of the appellees. Section 1983 provides a remedy to persons whose federal rights have been violated by governmental officials. 1946 St. Clair Corp. v. Cleveland (1990), 49 Ohio St. 3d 33, 34,

citing Monroe v. Pape (1961), 365 U.S. 167. Under the provisions of Section 1983, the complaint must allege that (1) some person has deprived the plaintiff of a federal right; and (2) the person who deprived the plaintiff of that right acted under the color of state or territorial law. Gomez v. Toledo (1980), 446 U.S. 634; 1946 St. Clair Corp., supra, at 34. While a plaintiff may seek redress against a governmental entity, e.g., a municipality, pursuant to Section 1983, Monell v. Department of Social Services (1978), 436 U.S. 658, an additional allegation must be included in the complaint. The complaint must assert that the action complained of was due to an established practice, policy or custom of the governmental entity. Canton v. Harris (1989), 479 U.S. 378, 109 S. Ct. 1197. See, also, Taylor v. Canton Ohio Police Dept. (N.D. Ohio 1982), 544 F. Supp. 783, 788. A plaintiff must, therefore, Set forth facts showing the existence of an offending custom or policy and mere conclusory allegations are insufficient. Sierra v. Lehigh County (E.D. Pa. 1985), 617 F. Supp. 427; Taylor, supra. In addition, in a case where a government employee is sued in his official capacity only, the claim is to be treated as being against the governmental entity of which the employee is an agent. Kentucky v. Graham (1985), 473 U.S. 159, 165. Therefore, a plaintiff in a Section 1983 case who names an employee in his official capacity only is seeking recovery from the governmental entity itself and is not attempting to establish the personal liability of the employee. Id.

We note that appellant named Officer Michael Babcock as a defendant in his official capacity only and did not seek recovery of damages from Babcock as an individual. Accordingly, for the purposes of this appeal,

appellant's alleged civil rights action shall be considered as being against only the governmental entities named as defendants in appellant's complaint.

A reading of appellant's complaint discloses that sufficient operative facts were provided which could, arguably, be interpreted to allege a violation of appellant's federal rights, e.g., the Fourth and Eighth Amendments of the Constitution of the United States, by persons acting under the color of state law, i.e., law enforcement officers and county officials acting under the authority of state law. Nonetheless, appellant's county officials complaint fails to set forth any facts which could be construed to demonstrate that the police officers or members of the sheriff's department were acting pursuant to a custom or policy of their respective governmental agencies. Thus, the complaint in this case fails to set forth operative facts sufficient to give fair notice that the action contains a claim made pursuant to Section 1983. Strauss v. Chicago (C.A.7, 1985), 760 F. 2d 765. Therefore the trial court did not err in concluding that, as a matter of law, no genuine issue existed as to whether appellant had properly set forth a claim pursuant to Section 1983. Appellant's sole assignment of error is found not well-taken.

On consideration whereof, this court finds substantial justice has been done the party complaining, and the judgment of the Lucas County Court of Common Pleas is affirmed. Costs of this appeal assessed to appellant.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See, also, Supp. R. 4, amended 1/1/80.

APPENDIX C

Rebecca Wright Twine, M.D., Plaintiff-Appellant, v. Probate Court, Franklin County, Ohio, et al., Defendants-Appellees

Twine v. Probate Court, Franklin County, Ohio

No. 89Ap-1170

Court of Appeals of Ohio, Tenth Appellate District, Franklin County

1990 Ohio App. LEXIS 2665

June 28, 1990, Rendered

PRIOR HISTORY:

Appeal from the Franklin County Court of Common Pleas.

DISPOSITION: Judgment affirmed.

COUNSEL: MS. REBECCA WRIGHT TWINE, M.D., pro se.

MR. MICHAEL MILLER, Prosecuting Attorney, and MR. MARK E. LINDER, for appellees.

JUDGES: Koehler, J. Bowman and Young, JJ., concur. Koehler, J., of the Twelfth Appellate District, sitting by assignment in the Tenth Appellate District.

OPINION BY: KOEHLER

OPINION: OPINION

This case is on appeal from a judgment of dismissal by the Franklin County Court of Common Pleas in favor of defendants-appellees, Franklin County Probate Court, Judge Richard Metcalf, and a referee, William A. Reddington.

On May 9, 1989, plaintiff-appellant, Rebecca Wright Twine, M.D., filed a complaint against appellees for false imprisonment, malicious prosecution, slander/libel, assault and battery, abuse of process, invasion of privacy, and violation of her civil rights pursuant to Section 1983, Title 42, U.S. Code. Appellant sought monetary and punitive relief, as well as a judicial expungement of her record.

The facts in this case indicate that on November 18, 1986, appellant's husband, by sworn affidavit in the Franklin County Probate Court, claimed that appellant represented a substantial risk of harm to others. It was then determined that appellant was in need of treatment for a mental illness. The support for this belief was verified by a licensed physician.

Based upon this sworn information, referee-appellee, William A. Reddington, recommended a temporary order of detention. The court thereupon issued a temporary order of detention ordering the sheriff's department to take appellant into custody and transport her to Harding Hospital.

Appellant was taken into custody and served with a copy of the temporary order of detention and a copy of the rights of involuntarily detained persons. An independent expert evaluation concerning appellant's mental condition was thereby performed.

At a hearing to determine whether appellant was mentally ill person subject to hospitalization, appellant voluntarily agreed to be placed in Harding Hospital for treatment. On December 26, 1986, appellant was discharged. As a result of her alleged improper and unnecessary institutionalization, appellant sought recovery in damages and other relief due to violations of her civil rights in finding her "mentally ill."

Appellees filed a motion to dismiss on June 14, 1989. The Franklin County Court of Common Pleas entered a judgment of dismissal in favor of appellees on July 17, 1989. A motion to reinstate this action by appellant was denied by the lower court on September 20, 1989.

Appellant now brings the instant appeal asserting that the lower court's dismissal of her complaint was improper since the statute of limitations was tolled due to the "doctrine of discovery" on all of her causes of action. We do not agree.

R.C. 2744.04(A) states:

"An action against a political subdivision to recover damages for injury, death, or loss to persons or property allegedly caused by any act or omission in connection with a governmental or proprietary function, whether brought as an original action, cross-claim, counterclaim, third-party claim, or claim for subrogation, shall be brought within two years after the cause of action arose, or within any applicable shorter period of time for bringing the action provided by the Revised Code. This division applies to actions brought against political subdivisions by all persons, governmental entities, and the states." (Emphasis added.)

Further, R.C. 2305.11(A) provides:

"An action for libel, slander, malicious prosecution, or false imprisonment, an action for malpractice other than an action upon a medical, dental, optometric, or chiropractic claim, or an action upon a statute for a penalty or forfeiture, shall be commenced within one year after the cause of action accrued * * * ."

Accordingly, appellant's causes of action for false arrest, libel/slander, abuse of process, false imprisonment, and malicious prosecution must be brought within one year from the time the cause accrued. The assault and battery claim pursuant to R.C. 2305.111 must also be brought within one year. In addition, appellant's invasion of privacy and civil rights causes of action apply the general two-year statute of limitations for personal injury cases found in R.C. 2305.10. See Valerio v. Dahlberg (1988), 716 F. Supp. 1031.

In the present case, appellant was hospitalized on November 18, 1986, by an order of temporary detention ordered by the Franklin County Probate Court. Appellant was served with said order on this date and read her rights as involuntarily detained person. At a subsequent hearing to determine whether appellant was a mentally ill person, subject to hospitalization by court order, appellant, who was represented by counsel, voluntarily agreed to treatment. On December 26, 1986, appellant was discharged.

The statutes of limitation found in R.C. 2305.10, 2305.11, and 2305.111 all commence upon the discovery date the injury or claim occurred or should have occurred. O'Stricker v. Jim Walter Corp. (1983), 4 Ohio St.

3d 84. Appellant's causes of action in this matter occurred as a result of her alleged invalid detention, apprehension, and hospitalization by the Franklin County Probate Court on November 18, 1986. However, appellant's subsequent discharge on December 26, 1986, clearly establishes the starting date for statute of limitations purposes.

Appellant knew, or should have known, of her alleged injuries by the date of her discharge from Harding Hospital. In addition, appellant's contentions that she was not mentally ill arguably would move the date she knew of her injuries and claims to November 18, 1986, due to her knowledge of the order of detention issued by the probate court.

Therefore, the statute of limitations for appellant's causes of action in false arrest, libel/slander, abuse of process, false imprisonment, assault and battery and malicious prosecution expired on December 26, 1987. The statute of limitations for invasion of privacy and the Section 1983 claim expired on December 26, 1988. Appellant is clearly time barred since her complaint was filed on May 9, 1989 in the court below. The argument advanced by appellant indicating that the "discovery rule" tolled the statute of limitations is accordingly not well-taken.

Further, appellant's substantive claims against judicial officers of the Franklin County Probate Court cannot withstand the doctrine of judicial immunity.

Although R.C. Chapter 2743 waives the doctrine of sovereign immunity by the State of Ohio, these statutes do not create new causes of action. Thus, for a cause of

action to be recognizable against the state, it must be proper as if between two private litigants.

It is a well-established principle of law that a judge or judicial officer will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority. However, a judge may be subject to liability when acting in a "clear absence of all jurisdiction." Bradley v. Fisher (1872), 13 Wall. 335, 351, 20 L.Ed. 646. See, also, Willitzer v. McCloud (1983), 6 Ohio St. 3d 447.

A judge is exempt from civil liability for "actions" in his judicial capacity. The factors determining whether an act by a judge is a "judicial one" relate to the nature of the act itself; i.e., whether it is a function normally performed by a judge and whether the parties dealt with the judge in his judicial capacity. Stump v. Sparkman (1978), 435 U.S. 349, 98 S.Ct. 1099.

The conduct of referee Reddington and Judge Metcalf through the recommendation and subsequent order of detention of appellant due to a mental disorder clearly is cloaked in "judicial immunity." The actions taken by the probate referee and judge are judicial in nature and are a function of their public obligation and responsibility.

Therefore, appellant's causes of action permitted by R.C. Chapter 2743 are barred by the doctrine of judicial immunity. No common law cause of action against a judicial officer exists for those acts which are solely judicial in nature.

Appellant's causes of action against appellees fail as untimely within the applicable statute of limitation. Further, the doctrine of judicial immunity precludes the substantive claims in this case based on the performance of "judicial acts."

Appellant's assignment of error is accordingly overruled.

For the foregoing reasons, the assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

APPENDIX D

Paul L. Freshour, Plaintiff-Appellant v. Dr. Carroll, M.D., et al, Defendant-Appellees

Freshour v. Carroll

No. 88 CA 34

Court of Appeals of Ohio, Fourth Appellate District, Pickaway County

1989 Ohio App. LEXIS 3273

August 17, 1989, Decided

DISPOSITION:

JUDGMENT AFFIRMED

JUDGES: Earl E. Stephenson, Judge, Abele, P.J., Concurs In Judgment & Opinion, Grey, J., Dissents with Opinion.

OPINIONBY [sic]: STEPHENSON

OPINION: DECISION AND JUDGMENT ENTRY

Earl E. Stephenson, J.

This is an appeal from a judgment entered by the Pickaway County Court of Common Pleas dismissing on motion an action filed by Paul L. Freshour, appellant herein, seeking the recovery of money damages. Jailer Marvin Widman and a Dr. Carroll, M.D., appellees herein, were made defendants.[1]

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[1] A motion was made by appellant to this court, which is hereby granted, to dismiss the appeal against Marvin Widman. Thus, we review only with respect to the dismissal of the action against Dr. Carroll.

Appellant's brief sets forth three "arguments" which we will treat as assignments of error.

ARGUMENT NUMBER ONE:

The Trial Court erred when claiming Plaintiff's action must be denied due to the Statute of Limitations. Plaintiff has a right for his actions to be heard especially since it was filed within a proper time, however delayed by a prejudice and bias Judge. The Defendant evades the real issue of medication.

ARGUMENT NUMBER TWO:

The Trial Court erred when claiming Plaintiff's action Res Judicata. Plaintiff's action can never be Res-Judicata especially since the plaintiff has fought hard within the proper Statute of Limitations in ascertaining the truth of why he was denied medication. The defendant evades the real issue of medication.

ARGUMENT NUMBER THREE:

The Trial Court erred when the trial Judge set in judgement [sic] of plaintiff's claims from which this trial Judge's known prejudice and bias and is engaged in actions with plaintiff of his own."

The record reflects that on May 2, 1988 appellant instituted an action in the court below by filing several documents, including two entitled "Complaint". The following is a summary of the complaint averments. On February 25, 1983, appellant was arrested and confined in the pickaway [sic] County jail. While being booked, appellant informed the jail authorities of his medical needs. It is further averred that although he informed the jailer on numerous occasions of his need for breathing

medication, no medication was furnished nor did he receive medical attention for a broken bone in his right hand, which injury occurred in the jail from getting down from a top bunk.

It is also averred that medication was sent to the jail by appellant's personal physician, but not given to appellant. It is further averred that the jail doctor admitted seeing appellant on two different occasions. "However the jail Doctor who seen plaintiff on at least two different occasions failed in providing the plaintiff with proper breathing medication even after seeing plaintiff and having the proper (in processing form) before him each time, that confirmed and informed of plaintiff's medical need of breathing medication, however as the medical records confirm Plaintiff without this medication regardless, even after being seen by Dr. Carroll, (the jail Doctor) on two different occasions. It is then averred that the neglect of medical treatment was caused by both defendants.

The complaint alleges a violation of a constitutional right to medical treatment and the denial was cruel and unusual punishment. Appellant prayed for the recovery of $25,000 from each defendant and, additionally, requested that Judge William C. Ammer, the resident Pickaway County judge, not hear the action.

On May 16, the then prosecuting attorney filed a Civ. R. 12(B)(6) motion to dismiss for failure to state a claim for relief against either defendant. The memorandum in support sought dismissal for failure to set forth factual allegations supporting a claim, and that the action was barred by the doctrine of res adjudica and collateral estoppel by reason of the filing in the Federal District

Court of the same claim against the pickaway [sic] County Sheriff Dwight Radcliff, which action was dismissed upon summary judgment. Dismissal was also sought on statute of limitation grounds.

The court issued, on August 3, 1988, an opinion, followed by entry, dismissing the complaint. The dismissal ground was, in substance, that the doctrine of collateral estoppel applied by the reason of the federal court and barred relitigation of the same issue in state court. Additionally, the court concluded the allegations against Dr. Carroll were either based upon a claim of malpractice or was a civil rights action, both of which were barred by the statute of limitations.

In adjudicating a Civil R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted, it is fundamental that the court is confined solely to the averments of the complaint. Civ. R. 12(B) provides as follows:

"Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: * * * (6) failure to state a claim upon which relief can be granted * * * . When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. * * * All parties shall be given

reasonable opportunity to present all materials made pertinent to such a motion by Rule 56."

If a court converts a Civ. R. 12(B)(6) motion to one for summary judgment in order to utilize outside material, notice must be given to the parties at least fourteen days before the time fixed for hearing. Federal Department Stores v. Lindley (1987), 30 Ohio St. 3d 135. It follows that the court's dismissal upon the ground of collateral estoppel based upon the federal district judgment was error since no notice of conversion to summary judgment was given.

The second assignment of error is sustained. However, a reversal is not required by reason of our disposition of the first assignment of error wherein we hold the action was barred by the statutes of limitations.

A motion dismiss may be granted for failure to state a claim when on the face of the complaint it appears the action is barred by the appropriate statute of limitations. Mills v. Whitehouse Trucking Co. (1974), 40 Ohio St. 2d 55. It must be conclusively demonstrated by the complaint averments that the action is barred. Durham v. Anka Research Ltd. (1978), 60 Ohio App. 2d 239.

Under the complaint averments in the case sub judice, appellant is either asserting a malpractice claim against De. Carroll under state law or a civil rights action under federal law. R.C. 2305.11(B) provides, inter alia, the following:

"In no event shall any medical claim against a physician, * * * be brought more than four years after the act or omission constituting the alleged malpractice occurred.

The limitations in this section for filing such a malpractice action against a physician, podiatrist, hospital, or dentist apply to all persons regardless of legal disability and notwithstanding section 2306.16 of the Revised Code, provided that a minor who has not attained his tenth birthday shall have until his fourteenth birthday in which to file a action for malpractice against a physician or hospital."

R.C. 2305.16 provides, in part here pertinent, as follows:

"Unless otherwise specially provided in sections 2305.04 to 2305.14, inclusive, and sections 1302.98 and 1304.29 of the Revised Code, if a person entitled to bring any action mentioned in such sections, unless for penalty or forfeiture, is, at the time the cause of action accrues, within the age of minority, of unsound mind, or imprisoned, such person may bring it within the respective times limited by such sections, after such disability is removed."

Thus, while imprisonment ordinarily tolls the statute of limitation, at least where the cause of action accrues after imprisonment, see Hibbert v. City of Cinn. (1982), 4 Ohio App. 3d 128, the tolling statute is expressly excluded by R.C. 2305.11(B) so that the action is barred four years after the act of malpractice occurred.

Alternatively, appellant's complaint arguably sets forth a claim for relief under Title 42 U.S.C. 1983,[2] which statute reads as follows:

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[2] State courts have jurisdiction over federal civil rights claims. Martinez v. California (1980), 444 U.S. 277.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Congress has not exacted a statute of limitations with respect to time periods for commencement of an action under Title 42 USC 1893 [sic]. In Wilson v. Garcia (1985), 471 U.S. 261, the court recognized the practice under 42 USC 1988 to determine the applicable state statute of limitations by stating the following at 267:

"First, courts are to look to the laws of the United States 'so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect.' [42 USC Sec. 1988 [42 USCS Sec. 1988].] If no suitable federal rule exists, courts undertake the second step by considering application of state 'common law, as modified and changed by the constitution and statutes' of the forum state. Ibid. A third step asserts the predominance of the federal interest: courts are to apply state law only if it is not 'inconsistent with the constitution and laws of the United States,' Ibid. Burnett v. Grattan, 468 US 42, 47-48, 82 LEd 2d 36, 104 S Ct 2924 (1984)."

Because of the difficulties attendant to step two, the court in Wilson v. Garcia, supra, held that Sec. 1983 actions are best characterized as personal injury actions for statute of limitation purposes. Thus, it follows that the two year limitation in R.C. 2305.10 is applicable.

In applying a state's statute of limitations, the tolling provisions are also applicable unless such tolling provision is inconsistent with policies underlying Sec. 1983. Board of Regents v. Tomanio (1980), 446 U.S. 478. Since appellant's federal cause of action arose after he was imprisoned, facially the tolling provision of R.C. 2305.16 would be applicable. However, in Vargas v. Jago (1986), 636 F. Supp. 425 (S.D. Ohio), the court held the tolling provision inconsistent with state law. In so holding the court stated, inter alia, as follows:

"It has long been this Court's opinion that the filing of section 1983 suits by prisoners serves a rehabilitative function, acting as a 'safety valve,' as it were, to relieve some of the tremendous pressure that builds in any captor/captive situation. By giving due consideration to the suits filed in which deprivations of civil rights are alleged, we hope to engender in those convicted and imprisoned a sense of respect for the law, not an easy task given the jaundiced eye with which most prisoners observe those in legal authority. The Supreme Court has held that one of the principal policies embodied in section 1983 is deterrence. Id. at 488, 100 S.Ct. at 1797. We cannot help but believe that, in order to effect the rehabilitative purpose described above, as well as to deter prison officials from misconduct, quick resolution of disputes is vital. Promptness is even more important, we think, when a prisoner is complaining that his current incarcerators are violating, or have violated, his civil rights. To allow a prisoner one year after his release to bring his section 1983 suit neither would effect deterrence as to the alleged offender, nor rehabilitation as to the alleged victim. Thus, so long as the state system erects no

barriers to the federal courts, we regard application of the state disability tolling statute to be 'inconsistent' with federal law."

It follows, therefore, that whether the complaint be one for relief under state or federal law, or both, the cause of action is barred by R.C. 2305.11(B) under the state claim and by R.C. 2305.10 under the federal claim.[3]

The first assignment of error is overruled.

Either is there any merit in the third assignment of error of prejudice and bias against appellant by the trial judge. Aside from the record being deficient for purpose of review, assuming, arguendo, such prejudice existed and the judge should not have presided, it was harmless error since the decision was one of law which we herein affirm as properly decided.

It is ordered that appellees recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

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[3] Appellant's complaint is arguably deficient to state a claim against Dr. Carroll since the eighth amendment cruel and unusual punishment provision applies only when there is a "deliberate indifference" to serious medical needs of prisoners. Estelle v. Gamble (1976), 429 U.S. 97. The complaint does not contain such averment. However, since appellant is proceeding pro se and a Civ. R. 12(B)(6) motion should be granted only when it is clear beyond doubt that appellant could prove no set of facts entitling him to relief, see Conley v. Gibson (1957), 355 U.S. 41, 45, we do not place our decision on that ground.

It is ordered that a special mandate issue out of this Court directing the Pickaway County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of filing of this Entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

DISSENTBY [sic]: GRAY

DISSENT:

GREY, J. DISSENTING:

I respectfully dissent.

I would sustain Freshour's first assignment of error because I do not believe his action to be barred by the statutes of limitation. In overruling Freshour's first assignment of error, the majority relies heavily on Vargas v. Jago, supra, In determining that application of the tolling provision was inconsistent with state and federal law.

In order to determine whether enforcing a tolling provision is either consistent or inconsistent with prevailing law, one must look to the spirit behind that provision. If one believes that the real purpose of the statute of limitations is to bar a plaintiff and deny him access to the courts, then, clearly, denying the application of the tolling provision is consistent with state and federal law. However, if one believes, as I do, that the purpose of the tolling provision is to allow individuals a reasonable time in which to obtain access to the courts, then allowing the

application of such a provision would be consistent with the spirit of the provision.

Here, the majority's opinion appears to go against the true spirit of the tolling provision, R.C. 2305.10. We reward litigious parties who sue first and think later; we look for ways to dismiss suits brought by more reflective parties; and then we wonder why litigation is increasing exponentially.

I don't wonder, but I do dissent.